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Case Comments

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CARRIERS—NEGLIGENCE PREDICATED ON EXTRAORDINARY DUTY OWING BY CARRIERS AND THEIR SERVANTS TO WEAK, AGED AND INFIRM WHO ARE PASSENGERS IS NEVER ESTABLISHED UNLESS NOTICE OF CONDITION OF PASSENGER IS BROUGHT HOME TO CARRIER.—Appellee was a passenger on appellant's train and was seated near the door of the coach. The door, which had been opened by trainmen, remained ajar while the train went through a tunnel, and appellee, who was suffering from a recurrence of asthma, was overcome by smoke. There was no evidence of notice to appellant of appellee's condition. It was shown that other passengers in the coach were not injured by the smoke. Appellee brought this action for damages for her injuries resulting from appellant's negligence in leaving the door open. Held, that negligence predicated on carrier's extraordinary duty of care to weak, aged and infirm passengers is never established unless notice of the condition is brought home to the carrier. *Louisville & N. R. Co.* v. *Turner*, 219 Ky. 92, 292 S. W. 758.

The authorities are uniform in laying down the general rule that where physical or mental weakness or disability of a passenger is apparent to, or brought to the attention of the carrier, the high degree of care which the law imposes upon him requires the carrier to take notice of the disability and conduct himself accordingly. *Sheridan* v. *Brooklyn City & N. R. Co.*, 36 N. Y. 39, 93 Am. Dec. 490; *Newark & S. O. R. Co.* v. *M'Cann*, 58 N. J. Law 642, 34 Atl. With this rule Kentucky is in accord. *Illinois Central R. Co.* v. *Allen*, 121 Ky. 138, 89 S. W. 150.

The decision in the instant case is based upon the exception to the general rule, and seems to be established beyond dispute in this state. Where there is no knowledge by the carrier of the infirmity of the passenger, only the care required in the case of persons in ordinary health is required of the carrier. *Illinois Central R. Co.* v. *Cruse*, 123 Ky. 463, 96 S. W. 821; *Louisville & Nashville R. Co.* v. *Brewer*, 147 Ky. 166, 143 S. W. 1014. The smoke which entered the train was proved not to have injured persons in normal health in the case at bar.

The law, as declared by the Kentucky Court of Appeals, seems to be accepted in the great majority, if not all of state courts of last resort. *Jacksonville St. Ry. Co.* v. *Chappell*, 21 Fla. 175; *Western & A. Ry. Co.* v. *Earwood*, 104 Ga. 127, 29 S. E. 913.

In *Mathew* v. *Wabash R. Co.*, 115 Mo. App. 468, 78 S. W. 271, the court said: "The effect of notice of the passenger's infirmities is to increase the measure of the carrier's duty. Where there is no such notice, it owes him no other or higher duty than it does to the other passengers who are not infirm." This opinion of the Missouri court was adopted by the Supreme Court of the United States in the case of *Wabash Railroad Co.* v. *Mathew*, 199 U. S. 605, 50 L. Ed. 329.

Logically no fault can be found with the rule, for it is equitable to carrier and passenger alike. W. C. S.

CORPORATIONS—FOREIGN CORPORATION'S NONCOMPLIANCE WITH STATUTE DOES NOT PRECLUDE IT FROM MAINTAINING ACTION WITHIN STATE.—Appellant sold the appellee furniture, machinery, and equipment for which it brought its action. The appellee answered denying the allegation of the petition; filed a counterclaim for breach of rental contract; and an amended answer alleging the noncompliance by the appellant with the provisions of Kentucky Statutes, section 571, which provides that "it shall not be lawful for any corporation to carry on any business in this state, until it shall have filed in the office of the Secretary of State a statement, signed by its president or secretary giving the location of its office or offices in this state and the name or names of its agent or agents thereat, upon whom process can be served." Upon issue joined the trial court directed the jury to return a verdict for the appellee; and upon the appellant's motion over the appellee's objection a verdict was also directed for the appellant upon the counterclaim. Held, that this action by the trial court was error; that the noncompliance by the appellant with the Kentucky Statutes, section 571, did not preclude it from maintaining an action in this state. *Falls City Machinery & Wrecking Co.* v. *Sobel-Mark Furniture Co.*, 219 Ky. 195, 292 S. W. 814.

The Court on appeal stated that the trial court had based its holding upon the opinion rendered in the case of *Oliver Co.* v. *Louisville Realty Co.*, 156 Ky. 623, 161 S. W. 570. 51 L. R. A. (N. S.) 293, Ann. Cas. 1915C 565, which held that a plaintiff corporation could not maintain its action within this state until it had complied with Kentucky Statutes, section 571. The court further said that the rule laid down in the Oliver case, supra, though long followed in many subsequent cases, had been changed because it worked many hardships and offorded many dishonest persons an easy means of committing fraud. *Williams* v. *Dearborn Truck Co.*, 218 Ky. 271, 291 S. W. 388.

When the Kentucky Statute, section 571, was first enacted, the rule of the principal case was adopted by the court in *Aultman & Taylor* v. *Mead*, 109 Ky. 583, 60 S. W. 294, 22 Ky. Law Rep. 1189; which was followed by *Johnson* v. *Mason Lodge No. 33, I. O. O. F.*, 106 Ky. 838, 51 S. W. 620, 21 Ky. Law Rep. 493; and *Hallam, Receiver* v. *Ashford, etc.*, 24 Ky. Law Rep. 870, 70 S. W. 197. This view was overruled however by *Fruin-Colon Contracting Co.* v. *Chatterson*, 146 Ky. 504, 143 S. W. 6, 40 L. R. A. (N. S.) 857; and *Oliver* v. *Louisville Realty Co.*, supra, which long remained the law until reversed a second time by the court in *Williams* v. *Dearborn Truck Co.*, supra. In this case the court adopted the reasons of the court in *W. T. Hays* v. *Providence Citizens Bank & Trust Co.*, 218 Ky. 128, 290 S. W. 1028, which reversed the rule of construction of Kentucky Statutes, section 199b-1. This statute required any person doing business under a fictitious name to file a certificate setting forth the parties owning the business. The rule had formerly been that a failure to comply with this statute rendered any contract by such a person unenforceable. *Hunter* v. *Big Four Auto Co.*, 162 Ky. 778, 173 S. W. 120, L. R. A. 1915D 987. The manifest injustice of

such a rule, and the express provision for a penalty for its violation, together with the absence of any express reference as to the effect of such violation upon any contract by the offending party led the court to hold that such violation could not be set up as a defense to an action upon the contract.

The apparent conflict of opinion which exists throughout the many jurisdictions, as to the effect of a violation of statutory provisions requiring foreign corporations to file information as to its principal office and its agents upon whom process might be served, is due largely to the differences in the context of the statutes by which the penalties are prescribed. Note 4 L. R. A. (N. S.) 688. C. P. R.

CORPORATIONS—MERE SOLICITATION OF BUSINESS IS NOT "DOING BUSINESS" WITHIN THE LAW AUTHORIZING SERVICE OF PROCESS ON FOREIGN CORPORATION DOING BUSINESS IN STATE.—Plaintiff seeks to recover from the defendant carriers for the loss of some pigs which he alleges were received by G company, the initial carrier, in good condition and were delivered to him by the terminal carrier in such a bruised and sick condition that all but twelve died. G company, the initial carrier filed a motion to quash the service of summons upon it on the ground that it operated no line of railroad in Kentucky and did no business in this state of a character sufficient to subject it to service of process. By subsection 6 of section 51 of Civil Code this service was authorized if G company was engaged in business in this state. The court found that the G company maintained an agent and office in this state for solicitation of business and rate adjustment thereon. Held, that although the mere solicitation of business by the agent of a foreign corporation did not constitute the doing of business within the statute, yet the maintaining of an office and agent for solicitation and rate adjustment on domestic business did show the doing of business in such a way as to manifest its presence in Kentucky and to render it subject to service of process in this jurisdiction. *Makeever* v. *Georgia Southern & F. Ry. Co.*, 219 Ky. 699, 294 S. W. 144.

It appears to be a well settled rule in this state that the mere solicitation of business by the agent of a foreign corporation is not doing business so as to render it amenable to service of process within this jurisdiction. *Commonwealth* v. *Southern Railway Co.*, 193 Ky. 474, 237 S. W. 11; *Tennessee Publishing Co.* v. *Walker*, 205 Ky. 420, 265 S. W. 941. A like rule is established in the federal courts. *Green* v. *Chicago, B. & Q. R. Co.*, 205 U. S. 530, 27 S. Ct. 280. In that case the court held that soliciting through its district freight and passenger agent in Philadelphia, freight and pasenger traffic for a railroad incorporated in Iowa and having its eastern terminal at Chicago was not doing business within the eastern district of Pennsylvania in such a sense that process could be served upon the corporation there. *Philadelphia & R. Ry. Co.* v. *McKibbin*, 243 U. S. 264, 37 S. Ct. 280; *International Harvester Co.* v. *Kentucky*, 234 U. S. 579, 34 S. Ct. 944. Decisions of the state courts are to the same effect. *Gamble-Robinson Co.* v. *Penn-*

sylvania R. Co., 157 Minn. 306, 196 N. W. 266; *Thurman* v. *Chicago, M. & St. P. Ry. Co.*, 254 Mass. 569, 151 N. E. 63. The latter is a leading case and contains a fine collection of cases.

Yet a solicitation of business coupled with other matters may constitute a doing of business within the state. *International Harvester Co.* v. *Kentucky*, supra; *Walsh* v. *Atlantic Coast Line R. Co.*, 256 Fed. 47; *Toledo Computing Scales Co.* v. *Miller*, 38 App. (D. C.) 237. In the latter case a foreign corporation having a sales agent in the District of Columbia who not only negotiated sales but looked after deliveries, collections and complaints was doing business therein. A soliciting by an agent of the purchase of property coupled with a delivery of the property purchased to the corporation in the state constitutes a doing of business in the state. *Duluth Log Co.* v. *Pulpwood Co.*, 137 Minn. 312, 163 N. W. 520. In *Moore* v. *Racine Rubber Co.*, 194 Ky. 106, 238 S. W. 381, where the foreign corporation did not have any resident agent or any branch office or any place of business in the state, but the sales manager visited the state to transact business with only one customer, the corporation was engaged in business in this state.

The court found that the facts of the principal case brought it within the rule announced by the Supreme Court in *St. Louis S. W. R. Co.* v. *Alexander*, 227 U. S. 218, 33 S. Ct. 245. There the service of summons from a state court of New York on a resident director of defendant railroad company was upheld on proof of the maintenance there of comparatively minor offices of the foreign railway corporation. We submit that in the last analysis the question as to whether a foreign corporation is "doing business" within the state is one of fact and is to be determined largely according to the facts of each individual case, rather than by the application of fixed, definite or precise rules. *Atchison, etc., R. Co.* v. *Weeks*, 248 Fed. 970.

The result of the principal case seems altogether a just one, founded upon sound principles and not lacking in authority. The court in so holding was not unmindful of the rule laid down by the Supreme Court in *International Harvester Co.* v. *Kentucky*, supra, where it said "that a foreign corporation to be subject to process from the state courts must have been carrying on business therein in such sense as to manifest its presence within the state." R. R. R.

CRIMINAL LAW—WHERE ENTIRE JURY WAS TAKEN TO A BARBER SHOP THAT SOME JURORS MIGHT BE SHAVED AND NO CONVERSATION WAS HAD RESPECTING CASE, REVERSAL WAS NOT REQUIRED FOR MISCONDUCT AND PERMITTING JURY TO SEPARATE.—The appellant was convicted of willful murder and given the death penalty. On appeal it was contended that it was grounds for a reversal because the jury was taken to a barber shop by deputy sheriffs in charge, in order that some of the jurors might be shaved. Outside of the jurors, deputy sheriffs, and barbers, no one was present, except the appellant's counsel, who came for his laundry and departed at once. It appeared that there was no conversation respecting case. Held, that reversal was not re-

quired on the ground of misconduct and permitting the jury to separate. *Seymour* v. *Commonwealth*, 220 Ky. 348, 295 S. W. 142.

The principal case seems in accord with the court's earlier decisions. In *Manfield* v. *Commonwealth*, 163 Ky. 488, 174 S. W. 16, the appellant, having been convicted of willful murder, complained that the sheriff on three different nights, during the trial, took the jury to a moving picture show. It appeared that the house was not crowded, that the jury sat on the front seats, while the sheriff occupied a seat nearby, from which he could see all the jurors; and that no one approached any of them, nor had any talk with them concerning the case. The court held that there was no misconduct and separation such as warranted a reversal and a granting of a new jury.

In *Johnson* v. *Commonwealth*, 179 Ky. 40, 200 S. W. 35, it appeared that while the jury, in charge of the sheriff, was strolling down the main street of the county seat, one juror crossed the street to address a friend on the other side, two others were permitted to go alone into a drug store to purchase tobacco, and a fourth engaged in a conversation with a person not a juror, just outside the store. The jurors were at all times in view of the sheriff and by affidavits it appeared that no conversations were had concerning the case. The court held that appellant had not been prejudiced and a reversal was denied.

In *Wynn* v. *Commonwealth*, 222 S. W. 955, 188 Ky. 557, the sheriff took the jury to witness a special attraction at a skating rink. A large space had been set aside for the skaters, and around the four sides, behind a railing, several rows of benches had been placed for spectators. The musicians were stationed near the center of the rink. The sheriff and members of the jury sat on the benches. One of the jurors, was a pianist and a cornetist; and upon request made to him and the sheriff he was permitted to assist the musicians. He was seated within about thirty feet of the sheriff. Here again the court refused to reverse because of alleged misconduct and separation.

And again in *Adkins* v. *Commonwealth*, 197 Ky. 385, 247 S. W. 26, the court held that in a prosecution for murder, a necessary separation of the jurors, housed in the jailor's residence because of the lack of large rooms, was immaterial, as there had been no opportunity for the jurors to have been improperly influenced.

In the Mansfield case, supra, the jurors were in the dark and more opportunity was afforded for them to be preyed upon than in the principal case. In the Johnson case, supra, the jury was divided into four groups, and again there was a better opportunity for fraud than in the principal case. In the Wynn case, supra, the hilarious environment in which the juror musician had placed himself, thirty feet away from the other jurors and the officer in charge, was more apt to reduce the seriousness surrounding the trial and to cause casual conversation to arise than the situation now presented. In the Adkins case the jurors were in different rooms. In the principal case the jurors were in the same room, and in the presence of the officers in charge. Less opportunity was presented for fraud in the principal case than in any of the

above cases. But even at that in the Wynn case the court said, "The mere opportunity to converse with a juror, nothing else appearing, is not sufficient to secure a new trial."

Similar cases in other jurisdictions are *Moore* v. *People*, 26 Colo. 213, 57 P. 857; *State* v. *Oteri*, 128 La. 939, 55 S. 582; *State* v. *Kinsauls*, 126 N. C. 1095, 36 S. E. 31; *State* v. *Bone*, 114 Iowa 537, 87 N. W. 507; *Kinnny* v. *State*, 67 Texas 175, 148 S. W. 783; and *King* v. *State*, 91 Tenn. 617, 20 S. W. 169. J. S. F.

ELECTIONS—CONSPIRACY TO PROCURE CERTIFICATES OF ELECTION FOR PERSONS NOT ENTITLED THERETO, SO CONSUMMATED AS TO MAKE IT IMPOSSIBLE TO DETERMINE THAT THEY WERE FAIRLY ELECTED REQUIRES THAT ELECTION BE SET ASIDE.—A conspiracy was entered into by persons interested in the election of the appellees, the object of which was to procure appellees' election by fraud, intimidation, and violence; the conspiracy was consummated; and as a result thereof appellees obtained certificates of election. Held, that none of the appellees were fairly elected and that there was no election, and that the office held by each of the appellees was vacant. *Taylor* v. *Neutzel, et al.* 220 Ky. 510, 295 S. W. 873.

The authority to declare that there was no election is found in section 1596a-12, Kentucky Statutes, which contains the following provision: "In case it shall appear from an inspection of the whole record that there has been such fraud, intimidation, bribery or violence in the conduct of the election that neither contestant nor contestee can be adjudged to have been fairly elected, the circuit court, subject to revision by appeal, or the Court of Appeals finally may adjudge that there has been no election. In such event the office shall be deemed vacant, with the same legal effect as if the person elected had refused to qualify." However, the court was not without authority found in the opinions of this and other courts to declare that there was no election. Where, from an inspection of the entire record, the court cannot determine that any candidate was fairly elected because of fraud, intimidation, bribery, or violence in the conduct of an election, the court not only has the power, but it is the solemn duty of the court, to adjudge that there was no election. *Ford v. Hopkins*, 141 Ky. 181, 132 S. W. 542; *Orr* v. *Kevil*, 124 Ky. 720, 100 S. W. 314; *Butler* v. *Roberson*, 158 Ky. 101, 164 S. W. 340; *Burke* v. *Greer*, 197 Ky. 555, 247 S. W. 715. Where fraud and irregularities occur in the conduct of an election to such an extent that it is impossible for the contest tribunal to separate with reasonable certainty the legal from the illegal or spurious votes, the precinct wherein the fraud occurs should be excluded. This is the well-settled law. *Virgil* v. *Garcia*, 36 Colo. 430, 87 Pac. 543; *Allen v. Wildman*, 38 Okla. 652, 134 Pac. 1102. The following cases fully sustain the correctness of the position taken by the court in the principal case on ground that such an election was not free and equal, as provided in section 6 of our Constitution, which is included in the Bill of Rights of that instrument: *Neeley* v. *Farr*, 61 Colo. 485,

158 Pac. 458; United States v. Cruikshank, 92 U. S. 542, 23 L. Ed. 588. In *De Walt v. Bartley*, 146 Pa. 529, the court said, "An election to be free, must be without coercion of every description. An election may be held in strict accordance with every legal requirement as to form, yet, if in point of fact the voter casts the ballot as the result of intimidation, if he is deterred from the exercise of his free will by means of any influence whatever, although there be neither violence nor physical coercion, it is not a free and equal election within the spirit of the Constitution." Certainly then, in the principal case, where challengers were not given an opportunity to have the challenges heard, where imposters crowded the polls and were allowed to vote, and where violence was practiced and assaults were made upon election officers and voters, the election was not free and equal.

The holding in this case is a very desirable one. It is both just and reasonable, and is supported by the weight of authority. B. C.

EVIDENCE—IN ABSENCE OF REQUEST COURT NEED NOT ADMONISH THE JURY NOT TO CONSIDER QUESTION TO WHICH OBJECTION WAS SUSTAINED.—The car of the appellee had been demolished by the truck of the appellant and the appellee had been given judgment. On appeal, the appellant insisted that the trial court had erred in failing to admonish the jury not to consider an unanswered question to which an objection had been sustained. Held: The trial court was under no obligation to admonish jury in such situation unless requested to do so by the complaining party. *Fenly Model Dairy* v. *Secuskie*, 218 Ky. 59, 290 S. W. 1044.

This court is in line with the authorities of other states in its holding. It is the duty of the complaining party to ask the court to instruct the jury not to consider evidence which upon motion of the complainant had been excluded from the record. It was held in *Johnson* v. *Wasson Coal Co.*, 173 Ill. App. 414, that "Failure to exclude evidence is not error, where it was agreed and so stated to the jury, that the evidence should be excluded and an instruction to that effect was promised but overlooked, since the defendant could have easily asked for and obtained such instruction." Other decisions in various states have upheld that rule. *Croft* v. *Chicago, R. I. & P. Ry.*, 109 N. W. 723, 134 Iowa 411; *Tishomingo Electric Light and Power Co.* v. *Gullett*, 152 P. 849, 52 Okla. 180; *Beach* v. *City of Seattle*, 148 P. 39, 85 Wash. 379.

The case at hand, however, is less difficult because the question to which the objection was made was never answered and had therefore not become a part of the evidence. It was offered as evidence but was never admitted and it has been held in some jurisdictions that in such cases the court is not obligated to admonish the jury even when asked to do so by complainant. The decisions were based upon the ground that the question was not evidence until answered and that the jury was not to consider anything but the evidence. *Pfaffenback* v. *Lakeshore & M. S. Ry. Co.*, 142 Ind. 246, 41 N. E. 530; *Chicago Consol. Traction Co.* v. *Gervens*, 113 Ill. App. 275. R. B. B.

EVIDENCE—IN AN ACTION ON AN INSURANCE POLICY COVERING DEATH FROM INJURIES FROM BEING THROWN FROM A HORSE-DRAWN VEHICLE, TESTIMONY OF INJURED'S WIFE AS TO THE ACCIDENT HELD INCOMPETENT. —Defendant insurance company insured the life of the plaintiff's husband for one thousand dollars if he should, "by being accidently thrown from any private horse-drawn vehicle . . . suffer loss of life." It is claimed in this action that the husband was fatally injured by being thrown from a loaded wagon which he was driving. The wife, who was present at the time of the accident, was called, over defendant's objection, to testify concerning the accident. Held: In an action on an insurance policy covering death from being thrown from a horse-drawn vehicle insured's wife was incompetent to testify. *North American Accident Insurance Company* v. *Caskey's Administrator*, 218 Ky. 756, 292 S. W. 297.

At common law a party could not testify for himself, because of interest. *Woodard* v. *Spiller*, 1 Dana. (Ky.) 179. But section 605 of the Civil Code of Kentucky completely abrogates this common law rule making every person competent to testify in his own behalf subject to certain modifications and exceptions found in section 606, subsection 2 of which says, "No person shall testify for himself concerning any verbal statement of, or any transaction with, or any act done, or omitted to be done by . . . one dead when the testimony is offered to be given. . . ."

The plaintiff here as wife of the insured was interested in this recovery and under the section cited above as construed by the Kentucky court in the case of *Combs* v. *Roark*, 206 Ky. 454, 267 S. W. 210, should not have been allowed to testify concerning the accident.

It seems clear from the wording of such statutes that they seek to include within their terms every phase of human experience and therefore courts have always given a very wide range of meaning to the words used. For example: The New York court in defining "transactions" says, "Personal transactions and communications as so used include every method by which one person can derive any information or impression from the conduct, language, or condition of another." *Holcomb* v. *Holcomb*, 95 N. Y. 316. And even this broad definition is exceeded by the Kentucky court in the case of *Kentucky Utilities Company* v. *McCarty's Administrator*, 169 Ky. 38, 183 S. W. 237.

In the present case the wife was testifying concerning, "An act done" by her husband and giving these words the same broad construction as given the word "transaction" by the courts, both his voluntary and involuntary acts would come within the meaning of the statutes and the wife's testimony would thereby be excluded.

Statutes usually exclude testimony concerning "transactions and communications" with a person since deceased or who has become incompetent and the courts in construing such statutes have almost universally given the words so used a very wide and comprehensive range of meaning. *Morris* v. *Norton*, 75 Federal 912, 21 C. C. A. 553; *Clifton*

v. *Meuser*, 79 Kan. 655, 100 P. 645; *Wilson* v. *Wilson*, 83 Neb. 562, 120 N. W. 147.

It seems from an examination of the cases that the Kentucky statute is almost unique including, "acts done or omitted to be done." However, the Kentucky court in giving such a broad meaning to the words so used is following by logical analogy the spirit of the great majority of jurisdictions and is consequently in accord with the majority view. J. C. B.

INSURANCE—IN A FIRE INSURANCE POLICY, THE REQUIREMENT OF SOLE AND UNCONDITIONAL OWNERSHIP OF A BUILDING AND FEE-SIMPLE OWNERSHIP OF THE GROUND HELD COMPLIED WITH, THOUGH THE BUILDING ENCROACHED ON THE PUBLIC STREET.—Appellee insured a store-building, with the appellant insurance company. The store burned, and the appellant refused to pay the amount of the insurance, claiming that it was not liable for the destruction of the building by fire, when the ground upon which the building stood, was not the property of the owner of the building in sole and unconditional fee-simple. After the building burned, it developed that the building stood in a very substantial part on a public street. Held, that one owning a store-house encroaching on a public street for several years without legal action being taken to compel its removal, complies with the conditions of the fire insurance policy requiring sole and unconditional ownership in fee-simple of the ground on which the building stood. *Home Insurance Company* v. *McCoy*, 218 Ky. 365, 291 S. W. 353.

It does not appear that the Court of Appeals had ever been confronted with this precise question before, although it had decided that an insured could recover for his part of a party wall. *Citizens Fire Insurance Company* v. *Lockridge*, 132 Ky. 1, 116 S. W. 303. Appellant relied on the provision in the insurance policy, which rendered the policy void, if the interest of the insured be other than unconditional and sole ownership, or if the subject of insurance be a building on ground not owned by the insured in fee-simple. *Fire Insurance Company* v. *Tayne*, 162 Ky. 665, 172 S. W. 1090; *French* v. *Delaware Insurance Company*, 167 Ky. 176. The court dismissed these cases as not applicable to the facts of the instant case, and based its decision upon the test, "Who is the real owner of the property, and on whom would the loss fall in case of the destruction of the property?" Clements on Fire Insurance, Vol. 2, 152; and in *Allen, et al.* v. *Phenix Insurance Company*, 12 Idaho 653.

The rule adopted in the Kentucky court is also followed in the federal court, which states it in the following manner, "Insured's ownership is 'sole' when no other than the insured has any interest in the property as owner, and is 'unconditional' when the quality of the estate is not limited or affected by any condition." *Rochester German Insurance Company* v. *Schmid*, 175 Fed. 720, 99 C. C. A. 206. The same rule is applied to a party wall. *Louisa Nelson* v. *Continental Insurance Company*, 31 L. R. A. (U. S.) 593. Although authority on this precise

point is scanty in the federal courts, there is no reason to believe that the ruling would not be adhered to, within the federal jurisdiction. Authority to sustain the rule applied by the Kentucky and federal courts is prevalent throughout the different jurisdictions. *Exchange Underworker's Agency* v. *Bates*, 195 Ala. 161, 69 So. 856; *Arkansas Insurance Company* v. *McManus*, 86 Ark. 115, 110 S. W. 797; *Phenix Insurance Company* v. *Hillard*, 59 Fla. 590, 52 So. 799, 138 Am. St. Rep. 171; *Bacot* v. *Phenix Insurance Company*, 96 Miss. 223, 50 So. 729, 25 L. R. A. (N. S.) 1226.

The courts in general are inclined to be very strict with the rule and lay particular stress on the phrase "when no other than the insured has any interest in the property insured." In the present case, the court pointed out that it was very evident that the city did not have any ownership in the store. It is safe to say, that the rule laid down in the principal case is sound. H. C C.

INSURANCE—INSURANCE COMPANY HELD LIABLE TO MORTGAGEE UNDER CLAUSE PROVIDING THAT MORTGAGOR'S VIOLATION OF POLICY WOULD NOT DEFEAT MORTGAGEE'S INTEREST.— H. borroweed $3,000 from P. and mortgaged his farm to secure it. Later pursuant to an agreement with the mortgagee H. insured the buildings against loss by fire with defendant for $2,500. The policy contained a clause, wherein it was agreed that the loss if any should be payable to the mortgagee, and also that the failure or refusal of insured to comply with any obligations of the policy or violation by him of any of its terms, would not invalidate the policy to the extent of the mortgagee's interest. The policy further provided that if the property should thereafter become incumbered or mortgaged without written consent of the company thereon, the policy should be void. H, the mortgagor executed a second mortgage on the property without written consent of defendant and afterwards fire destroyed the property. This is an action by the mortgagor and mortgagee to recover the amount of the policy. Defendant claims a forfeiture. Held: That the mortgagor's violation of the terms of the policy did not render policy invalid as to the extent of the mortgagee's interest and defendant was liable to the mortgagee. *Niagara Fire Ins. Co.* v. *Hawkins*, 220 Ky. 234, 294 S. W. 1070.

The later forms of policies contain what is known as "the union mortgage clause" or "the standard mortgage clause," by which it is stipulated that in case the loss is directed to be payable to a mortgagee, the interest of the mortgagee in the proceeds of the policy shall not be invalidated by the act or neglect of the mortgagor or owner of the insured property. The policy in the principal case contained such a clause. In construing this clause the courts are unanimous in holding that it operates as a separate and independent insurance of the mortgagee's interest, to the extent at least that no act or omission on the part of the owner, which occurs after issuance of the policy, will affect mortgagee's right to recovery. *Heilbrunn* v. *German Alliance Co.*, 202 N. Y. 610, 95 N. E. 823; *Reed v. Firemen's Ins. Co.*, 81 N. J. L. 523, 80

Atl. 462; *Flint* v. *Westchester Ins. Co.*, 207 Mass., 337, 93 N. E. 646; *Home Ins. Co.* v. *Botner*, 218 S. W. (Tex. Civ. App.) 1097; *Critchlow* v. *Reliance Mutual Ins. Ass'n*, 198 Iowa 1086, 197 N. W. 318; *Federal Land Bank* v. *Globe & Rutgers Fire Ins. Co.*, 187 N. C. 97, 121 S. E. 37; *Newark Fire Ins. Co.* v. *Turk*, 6 Fed. (2nd) 533.

There is however a difference of opinion as to the effect of a union mortgage clause, which arises where the act of the insured which is relied upon to avoid the policy is some misrepresentation or concealment which occurred at time of issuance of the policy. The weight of authority would seem to support the conclusion that the rule is the same under such circumstnaces. *Bacot* v. *Phenix Ins. Co.*, 96 Miss. 223, 50 So. 729; *Syndicate Ins. Co.* v. *Bohn*, 65 Fed. 165, 12 C. C. A. 531; *Reed* v. *Firemen's Ins. Co.*, supra; *Hastings v. Westchester Fire Ins. Co.*, 73 N. Y. 141; *People's Savings Bank* v. *Retail Merchants' Mutual Fire Ins. Co.*, 146 Iowa 536, 123 N. W. 198; *Smith* v. *Union Ins. Co.*, 25 R. I. 260, 55 Atl. 715.

On the other hand a different result was reached in *Baldwin* v. *German Ins. Co.*, 105 Iowa 379, 75 N. W. 326, where it was held that if the policy was void from its inception as to a mortgagor, no contract could arise between insurer and mortgagee when the union mortgage clause attached. This view finds support in the following cases: *Hanover Fire Ins. Co.* v. *Nat'l Exchange Bank*, 34 S. W. (Tex. Civ. App.) 333, where there was failure on the part of insured to disclose existence of vendor's lien and mortgage. *Liverpool & L. & G. Ins. Co. v. Agri. Savings & Loan Co.*, 33 Can. S. C. 94.

The principal case falls clearly within the principle first enunciated, the act of the mortgagor which avoided the policy as to his interest being one which occurred after the issuance of the policy. No possible doubt can exist as to the correctness of the court's decision.

R. R. R.

LANDLORD AND TENANT—LANDLORD HAVING OPTION UNDER LEASE TO RELET PREMISES UPON LESSEE'S ABANDONMENT, HELD NOT REQUIRED TO RELET, BUT COULD DEMAND CONTRACT RENT FROM LESSEE.—Plaintiff, as lessor, leased certain premises to defendant for a term of years at a specified annual rental. Before the term was half up defendant abandoned the property, paid the rent for a time after the abandonment, and then refused to make further payments. Plaintiff brought this action for the rent due under the contract. A clause in the lease provided that the lessor should have the option, in the event that the lessee was disposd by summary proceedings or abandoned the premises, to relet said premises as agent for the lessee or otherwise, such rent to be applied to fulfillment of lessee's covenant. Defendant contended, in filing counterclaim and answer, that plaintiff, under this clause should have used diligence to find a new tenant, and that it was not obligated to pay the rent after abandonment because plaintiff had failed to do so. Held, that the clause in the lease imposed no obligation of the lessor to relet, and that he had a right to stand upon his contract and look to

lessee for rent agreed upon. *Superior Woolen Co., Tailors, Inc.* v. *M. Samuels & Co., Inc.*, 219 Ky. 539, 293 S. W. 1078.

The rule laid down by the Court of Appeals in the instant case was declared by the same court to be the law in the case of *Abraham* v. *Gheens*, 205 Ky. 289, 265 S. W. 778. There the lessee held over under a yearly lease, and vacated the premises before the second year was up. The court overruled lessee's contention that lessor should have used diligence to find another tenant, holding that the lessor was under no such obligation, as he had a right to stand on his contract. This rule has apparently been settled in Kentucky, the reasoning of the courts being that a tenant by his own wrong should not be permitted to impose this duty upon the landlord.

The majority view is in full accord with the Kentucky holding, and is supported by substantially the same reasoning. *Selz* v. *Stafford*, 284 Ill. 610, 120 N. E. 462; *Underhill* v. *Collins*, 132 N. Y. 269, 30 N. E. 576. In *Higgins* v. *Street*, 19 Okla. 45, 92 Pac. 153, the court states the rule very clearly, declaring that, where the tenant abandons the premises, the landlord may, at his option, ". . . consent to the surrender, . . . or he may suffer the premises to remain vacant, refuse to consent to a surrender, and sue on the contract at the end of the term for the entire rent." In the principal case this option referred to was merely incorporated into the lease, but such a provision was manifestly unnecessary.

It has been held that even where another offers to take the abandoned premises, the landlord need not accept him, but may still look to the tenant. *Boardman Realty Co.* v. *Carlin*, 82 Conn. 413, 74 Atl. 682.

In Florida and Iowa there is dicta to the effect that a landlord should be required, in event of abandonment by lessee, to use due diligence in finding a new tenant. *Roberts* v. *Watson*, 196 Iowa 816, 195 N. W. 211; *Campbell* v. *McLaurin Invest. Co.*, 74 Fla. 501, 77 So. 277. This is decidedly the minority view.

However, in the case at bar, had the clause in the lease been worded so as to require the landlord to rerent, instead of merely giving him the option, it is probable that it would then have been incumbent upon him to use due diligence to find a tenant. *Harmon* v. *Callahan*, 214 Ill. App. 104, 40 A. L. R. (note) 197. W. C. S.

LANDLORD AND TENANT—LESSEE COULD RECOVER EXPENDITURE FOR REPAIRS ON PRACTICAL DESTRUCTION OF STOREHOUSE BY FIRE WITHOUT HIS FAULT, NOTWITHSTANDING LEASE REQUIRED LESSEE TO MAKE REPAIRS.—Plaintiff leased to the defendant a brick store building for a period of one year with privilege of renewal. Rental terms provided for part of the rent to be used monthly for repairs to the building, which the lessee was authorized to make with approval of the lessor. The lease provided that the lessee should keep the building in repair and return it at the expiration of the lease in as good condition as it was when the lessee took possession, ordinary wear and tear excepted. A fire destroyed all of the building except walls or parts thereof. This

suit was instituted to recover the reasonable cost of repairs which had been deducted from the rent. The case was decided under Kentucky Statutes, section 2297, which provides that unless otherwise expressly stated, a lessee contracting to keep a building in repair cannot be held responsible for rebuilding a similar building if the rented building is, without his fault, destroyed by fire. Nor could he be held accountable for rents for the balance of the term stipulated in the lease. The court summed up its decision by saying that the contract could never have meant the rebuilding of the storehouse if it were destroyed by fire. *Hazard Bank & Trust Co.* v. *Hazard Mercantile Co.*, 220 Ky. 165, 294 S. W. 1034.

According to the common-law rule a covenant on the part of the lessee to repair or keep in good repair imposes on him an obligation to rebuild structures upon the demised premises if they were destroyed during the term even where he were without fault, and irrspective of the cause of the destruction, whether storm, flood, fire, inevitable accident, or the act of a stranger. *Lockrow* v. *Horgan*, 58 N. Y. 635; *Ramsay* v. *Wilkie*. 13 N. Y. S. 554; *Moses* v. *Old Dominion Iron Works*, 75 Va. 95; *Phillips* v. *Stevens*, 16 Mass. 238; *Abley* v. *Billup, et ux.*, 35 Miss. 618, 72 Am. Dec. 143; *Fowler, et ux.* v. *Bott, et al.*, 6 Mass. 63; *Fowler and Moore* v. *Payne*, 49 Miss. 32.

Thus it is seen that by ancient law a tenant was bound to rebuild though the loss arose from tempests, fire, or other ineyitable casualties; but in modern times, more equitable principles have been adopted by the courts of law. In the case of *Freiot* v. *Jacobs*, et al., 204 N. Y. Supp. 446, it was held that where a leased building is destroyed by fire, if the tenant desires, he may surrender and not be responsible for the rent for the unexpired term. But if he elects to remain and to rebuild, he cannot hold the lessor for the cost of such repairs.

Armstrong v. *Maybee*, held that where the lessee contracts to leave the premises in as good repair as when he entered, ordinary wear and tear excepted, he would not be responsible for "the total or partial desruction of the building by an unexpected catastrophe." This case is in line with the leading case, as are *Realty Co.* v. *Rea*, 184 Cal. 565, 194 P. 1024; *Wattles* v. *Southern Omaha Ice Co.*, 50 Nebr. 251, 69 N. W. 785; *Norman* v. *Stark Grain Co.*, 237 S. W. 963.

Thus it is seen that contracts providing for repairs to be made by the tenant, leaving the property in as good condition as it was when rented, will not bind the lessee when partial or practical destruction results from causualties without the fault or beyond the control of the lessee. A. K. R.

PHYSICIANS AND SURGEONS—STATE BOARD HELD UAUTHORIZED TO REVOKE DENTIST'S LICENSE BECAUSE HE WAS CONVICTED OF MISDEMEANOR OF POSSESSING LIQUOR.—Appellee, a practicing dentist, was convicted on a charge of unlawfully possessing intoxicating liquor in the federal court of Covington, Ky., and fined. Later the Kentucky State Board of Dental Examiners, upon an affidavit filed with the board, notified ap-

pellee to appear before it to answer charges of having "violated section 6 of the act regulating the practice of dentistry in Kentucky, which disqualified you to practice dentistry with safety to the people." A month later, the board notified appellee that his license to practice dentistry was revoked. Appellee, by this action, sought a mandatory order to compel the appellant to issue him a renewal license in lieu of the one revoked. Held license should reissue. *Kentucky State Board of Dental Examiners* v. *Crowell*, 220 Ky. 1, 294 S. W. 818.

Kentucky Statutes, section 2636-6, regulates the revocation of licenses to practice dentistry, and subsection 2 of that act provides that the license of a practicing dentist shall be revoked "if he be guilty of the commission of a criminal operation, or the conviction of a felony involving moral turpitude, or chronic or persistent inebriety, or addicted to drugs, . . . or be guilty of any unprofessional conduct likely to deceive or defraud the public, or which disqualifies the applicant to practice with safety to the people." The record shows that appellee's license was revoked solely on the ground of his conviction in the federal court. This was not a felony, but a misdemeanor and does not involve moral turpitude, so the offense charged does not come within the statute above quoted and, therefore, the court held the revocation of appellee's license was without effect and unlawful and the chancellor held that the state board of dental examiners had acted beyond and without its powers and directed the board to reissue a certificate to the appellee, authorizing him to practice when he had complied with the requirements of the statute. No error is found in this.

In the case of *Matthews* v. *Murphy*, 63 S. W. 785, 23 Ky. Law R. 750, 54 L. R. A. 415 (cited in the opinion), it was held that a license of a physician could not be revoked for "unprofessional conduct" because the expression was too vague and does not afford a standard by which a practicing physician might know what the board would hold to be unprofessonal conduct, and further, in the same case, it was held that the certificate and right to practice a profession such as medicine or dentistry, is an estate or right of which the holder of the certificate may not be deprived without due process of law.

The case illustrates the danger of extending judicial powers to extra-legal bodies such as boards and commissions by the legislature, and the wisdom of judicial appeal from their decisions. G. L. B.

WATERS AND WATER COURSES—MINING OPERATORS ARE USUALLY NOT RESPONSIBLE FOR DAMAGES FROM DIVERTING WATER.—The appellee was the owner of a house and lot used as a dwelling place. On the lot was a well which furnished water for the family of the appellee. The appellant was engaged in operating a coal mine near the home of the appellee. The basis of the action is that the appellant negligently and improperly mined and removed coal in such a manner as to not leave sufficient support for the overlying surface and that by reason thereof there was a break or crevice and that said cave-in caused large cracks to open through the surface of the appellee's property, thereby de-

stroying his well and otherwise damaging the property. The court, basing its opinion on the case of the *Ohio Collieries Co.* v. *Cocks*, 107 Ohio St. 238, 140 N. E. 356, held that ordinarily those engaged in mining operations are not responsible for damages caused by diverting or destroying the flow of water *West Ky. Coal Co.* v. *Dillback*, 219 Ky. 783, 294 S. W. 478.

The reasult reached in this case is in accord with a prior Kentucky holding where railroad was held not liable for the drying up of wells caused by the construction of its road on a right of way purchased in the absence of making of cuts in a negligent or unusual manner. *Wasiota & B. R. R. Co.* v. *Hensley*, 148 Ky. 366, 146 S. W. 751.

This seems to be the holding generally as evidenced by the Ohio case mentioned above and by the leading New York case on the same subject. The Kentucky cases quoted show that it is unquestionably the ruling in this state. The owner of soil in the use or improvement of his property may intercept or divert percolating subsurface water without any liability for damage to other lands. *Erie County* v. *Friedenberg*, 159 N. Y. Supp. 913, 96 Misc. Rep. 222.

The law, therefore, is well settled that one using his property in the manner consistent with his occupation, such as mining or railroading, is not responsible for diverting percolating waters which supply well or spring water for adjacent landowners. A. K. R.

WATERS AND WATER COURSES—WATER COMPANY HELD NOT RELIEVED FROM LIABILITY FOR FIRE LOSS ON GROUND THAT FREEZING OF HYDRANTS WAS ACT OF GOD.—Defendant water company supplied water to city of Harlan under a written contract, "that all mains should be placed at a sufficient depth as not to be affected by freezing and that hydrants should be two-faced and self-draining." The city had extra hydrants installed especially for protection against fire. The house of plaintiff, who was a resident citizen of Harlan, caught fire during the night. The fire department, which was proved to be amply equipped and competent, responded promptly but on attaching hose to all hydrants within reach of the conflagration found the water in them frozen. Consequently the fire department could do nothing and the building was destroyed. The defendant contended that this freezing of the hydrants water company is not relieved from liability for fire loss on ground was an "act of God" and therefore relieved it of liability. Held, a that freezing of hydrants is an act of God. *Harlan Water Co.* v. *Carter*, 220 Ky. 493, 295 S. W. 426.

In legal acceptance "an act of God" has been defined by the Federal Court, in *United States* v. *Kansas City Southern Ry. Co.*, 189 Fed. 471, as "something which occurs exclusively by the violence of nature, or at least an act of nature which implies an exclusion of all human agencies." This definition is as accurate and specific as perhaps any that could be given. And Kentucky, together with the great majority of the states, has ascribed a similar meaning to the phrase. *Southern Ry. Co.* v. *Smith*, 125 Ky. 656, 102 S. W. 232.

The trial court found as a matter of fact, in the present action that the hydrants would not have frozen had they been properly installed, consequently the damage was not the result of "an act of God."

The Kentucky court, in *Paducah Lumber Co.* v. *Paducah Water Supply Co.*, 89 Ky. 340, 112 S. W. 554, 7 L. R. A. 77, 25 Am. St. Rep. 536, declared that where a water company contracts with a city to furnish at all times a supply of water sufficient for the protection of the inhabitants and property of the city against fire, the company must answer in damages, to the individual property owners, for loss by fire resulting from its failure or refusal to perform its contract and the only question to be determined is, whether considering the purpose, character, and capacity of the water works and all the attending circumstances and agencies, the fire which destroyed the property would have been prevented or extinguished before the damage was done if the company had performed its contract. This dcision was cited with approval in *Mountain Water Co.* v. *Davis*, 195 Ky. 195, 241 S. W. 801, which further stated that the property owner must show that his property was lost as a proximate result of the company's failure to perform its contract. This view as reiterated in the present case, although admittedly contrary to the great majority of states is well settled and closely followed in Kentucky.

Kentucky, together with Florida and North Carolina, which are the only states found in accord, hold that such a case falls within the rule that one may sue on a contract made for his benefit by another. *Kenton Water Co.* v. *Glenn*, 141 Ky. 529, 133 S. W. 573; *Woodbury* v. *Tampa Waterworks Co.*, 57 Fla. 243, 49 So. 556, 21 L. R. A. (N. S.) 1034; *Morton* v. *Washington Light and Water Co.*, 168 N. Car. 582, 84 S. E. 1019.

The first case found dealing directly with this question in this country is a Connecticut case in 1878, which holds that a property owner is a stranger to this agreement with a municipality and cannot maintain an action on it. *Nickerson* v. *Bridgeport Hydraulic Co.*, 46 Conn. 24, 33 Am. Rep. 1. This doctrine was adopted by the Supreme Court of the United States in *German Alliance Ins. Co.* v. *Home Water Supply Co.*, 174 Fed. 764, 99 C. C. A. 258, 226 U. S. 220, 42 L. R. A.. (N. S.) 1000, and with the exceptions noted above, has been uniformly followed by the states.

J. C. B.

WILLS—SEPARATE SHEETS OF PAPER HELD PROPERLY PROBATED IN VIEW OF EVIDENCE OF THEIR IDENTITY WITH THOSE PREPARED AND EXECUTED AS WILL—The proponent offered for probate a will which was typewritten on two pages and upon two separate sheets of paper. The first sheet contained all of the disposing clauses, together with a clause nominating the personal representative to execute it. There was not room enough thereon for the signature of the testatrix. At the top of the second sheet there was the attestation clause followed by the signature of the testatrix at the right margin of the page; and below it upon the left margin of the page were the signatures of the attesting wit-

nesses. Parol evidence by the attorney who drew the will and of the attesting witnesses was admitted to the effect that both sheets were handed to the testatrix; that, after reading the same, she executed it in their presence. The contestant objected to the admission of the will to probate because the papers purporting to be her will were not executed according to law. Held, the detached sheets of paper should be admitted to probate as the last will of testatrix. *Cole* v. *Webb*, 220 Ky. 817, 295 S. W. 1035.

The court recognized the rule that several separate sheets of paper may be admitted to probate provided they are coherent in sense, Annotation, 30 A. L. R. 424, but preferred to base its decision upon the ground that parol evidence was admissible to identify the offered papers with the ones actually subscribed and that the attesting witnesses if otherwise competent may testify to such facts. *Montgomery, &c.* v. *Perkins, &c.*, 2 Metc. (Ky.) 448; *Welch* v. *Welch*, 2 T. B. Mon. (Ky.) 83.

Although it is generally established that a will need not be written on one sheet of paper but may be written upon several sheets provided they are so connected together that they may be identified as parts of the same will, *Barnewall* v. *Murrell*, 108 Ala. 366, 18 So. 831; *Palmer* v. *Owen*, 229 Ill. 115, 82 N. E. 275; *Harp* v. *Parr*, 168 Ill. 459, 48 N. E. 113; *Ela* v. *Edwards*, 16 Gray (Mass.) 91; and that connection by the meaning and coherence of the subject matter is sufficient, *Sellards* v. *Kirby*, 82 Kan. 291, 108 Pac. 83, 136 Am. St. Rep. 110, 28 L. R. A. (N. S.) 270, 25 Columbia Law Review 879, p. 888, 33 Harvard Law Review 989, 33 Yale Law Review 793; it is submitted that the holding of the principal case might well stand upon the reasons there adopted rather than upon the rule which admits to probate several sheets of paper provided they are connected either by artificial connection or internal sense, even though the latter rule were in effect in this jurisdiction.

C. P. R.